FOR ARGUMENT

No. 88-1993



IN THE

# Supreme Court of the United States

October Term, 1989

ROBERT A. BUTTERWORTH, JR.
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR.
as State Attorney to the Charlotte County, Florida
Special Grand Jury,

*Petitioners,*

v.

MICHAEL SMITH,

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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## BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL NEWSPAPER ASSOCIATION, NATIONAL PRESS CLUB, NEWSLETTER ASSOCIATION, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENT MICHAEL SMITH

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## TABLE OF CONTENTS

## TABLE OF CITATIONS





## TABLE OF CITATIONS

## TABLE OF CITATIONS





## TABLE OF CITATIONS

**TABLE OF CITATIONS**





No. 88-1993

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**Robert A. Butterworth, Jr.,**
Attorney General of the State of Florida,
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as State Attorney to the Charlotte County, Florida Grand Jury,
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**Michael Smith,**
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On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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Brief of Amici Curiae Reporters Committee for Freedom of the Press, American Newspaper Publishers Association, American Society of Newspaper Editors, National Association of Broadcasters, National Newspaper Association, National Press Club, Newsletter Association, Radio-Television News Directors Association, and Society of Professional Journalists in Support of Respondent Michael Smith

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## STATEMENT OF INTEREST

Amici curiae are nine organizations rep-

resenting a broad spectrum of print and broadcast journalists nationally who gather and disseminate news about criminal judicial proceedings and the operations of government.

They believe that adoption of the position advocated by the Petitioner -- that a broad, mandatory, perpetual gag on grand jury witnesses in all cases is permissible under the First Amendment -- would have a detrimental impact on news coverage well beyond the boundaries of Florida. If witnesses, including journalists, can be forever prevented from discussing publicly what they know about a case merely because they were questioned by grand juries "some continuing public grievances could never be discussed at all. . . ." Wood v. Georgia, 370 U.S. 375, 393 (1962).

Amici have written permission from both parties to file this brief. Copies of their letters have been filed with the clerk in



accordance with U.S. Supreme Court Rule 29.

Amici are:

The Reporters Committee for Freedom of the Press is an unincorporated association of working reporters and news editors dedicated to protecting the First Amendment and freedom of information interests of the news media. It has provided research, guidance or representation in virtually every major press freedoms case since its founding in 1970.

The American Newspaper Publishers Association is a nonprofit corporation whose membership consists of about 1,400 newspapers constituting about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 1,000 people who hold

positions as directing editors of daily newspapers throughout the United States.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association that serves and represents America's radio and television stations and all the major networks. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The National Newspaper Association, with 5,000 members, is the oldest and largest national trade association in the newspaper industry, representing the interests of weekly and daily newspapers throughout the country.

The National Press Club is a dues-paying organization of more than 4,300 print and broadcast correspondents, reporters, editors, photographers, publishers, editorial writers and editorial news cartoonists



and artists, among others. The Club takes an active interest in the exercising of press rights nationally and, through its Freedom of the Press Committee, has sponsored hundreds of presentations on press responsibilities and freedoms.

The Newsletter Association is an international trade association of 850 publishers of more than 2,000 newsletters and other specialized services.

The Radio-Television News Directors Association, with a membership of more than 3,000 persons, is the principal professional organization of journalists -- executives, editors, reporters and others -- who gather and disseminate news and other information on radio and television in the United States.

The Society of Professional Journalists is a voluntary, nonprofit organization of nearly 20,000 members. The Society is the largest and oldest organization of journal-

ists in the United States, representing every branch and rank of print and broadcast journalism.



## STATEMENT OF FACTS

Amici adopt the statement of the case and facts as set forth by the State of Florida with the following additions.

In 1985, the Charlotte, Fla., Herald-News published several stories by Michael Smith alleging corruption in the office of State Attorney Joseph D'Alessandro. Smith reported that D'Alessandro had withheld information from grand jurors during investigations and had failed to press charges against drug smugglers who later were indicted by federal grand juries. See Appendix at pg. A-4.

On June 26, 1985, the Herald-News published a story by Smith alleging that Lee County officials covered up a 1974 homicide near the boundary of Lee and Charlotte counties. The front-page story stated that evidence had been uncovered by Smith and two private individuals indicating that officials had deliberately made the killing of

18-year-old Brad Jackman look like a suicide. Lee County Sheriff Frank Wanicka, who was hunting with Jackman when he was shot, and some of his deputies "may have participated in the cover-up," the newspaper concluded, based upon Smith's months-long investigation. See Appendix at pg. A-1.

Shortly after Jackman's death, the Lee County Sheriff's Department, the Florida Department of Criminal Law Enforcement, the Lee County medical examiner, the Dade County medical examiner, and a Lee County grand jury investigating the death all concluded that Jackman had committed suicide. See Appendix at pg. A-1.

After the initial story, the Herald-News published several other articles by Smith alleging a cover-up of Jackman's death by Wanicka, D'Alessandro and State Attorney Robert Eagan, the prosecutor in charge of



the 1976 grand jury inquiry into the death, and other officials.[1]

Subsequently, a new grand jury convened to re-examine evidence related to the homicide. It asked Smith to testify in December 1985. Shortly thereafter, D'Alessandro, who was rumored to be a target of the grand jury investigation, disqualified himself from the inquiry and asked the governor to appoint an outside state attorney to handle the case. D'Alessandro stated that he was withdrawing from any grand jury probe resulting from Smith's testimony. See Appendix at pg. A-3.

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[1] See e.g. Smith, "Suit filed to force Wanicka to release evidence on so-called Jackman 'suicide'," Herald-News, June 28, 1985, p. 1, col. 1; Smith, "Captain disputes Jackman 'suicide'," Herald-News, July 3, 1985, p. 1, col. 1; Smith, "Jackman jury misled by Eagan?" Herald-News, July 18, 1985, p. 1, col. 1; Smith, "Few witnesses called in probe," Herald-News, July 19, 1985, p. 1, col. 4.

T. Edward Austin, a state attorney in Jacksonville, was appointed to succeed D'Alessandro. Austin asked Smith to testify before the grand jury a second time in January 1986. Afterward, Austin publicly stated that D'Alessandro's office was a target of the grand jury inquiry. See Appendix at pg. A-5.

Austin subpoenaed Smith to appear before the grand jury again in March 1986.* At that time, the state attorney's staff warned Smith that, once he testified, he was prohibited from publishing any information about the grand jury investigation.

The special grand jury terminated its investigation in April 1986 without issuing any indictments.

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* Because Smith testified voluntarily on two occasions and complied with the subpoena summoning him before the grand jury for a third time, Amici will not address the issue of whether the grand jury had authority under state case law to compel him to testify.



Myers News-Press and St. Petersburg News-Press reported the contents of Smith's stories and the fact that Smith testified before the grand jury about the subject of his stories.

## SUMMARY OF THE ARGUMENT

Fla. Stat. § 905.27 is unconstitutional, whether it is viewed as a prior restraint on speech by grand jury witnesses or a post-publication punishment of those who disclose what they told the grand jury. Such restraints or sanctions are permissible only when expression poses a clear and present danger to some compelling state interest and if they are capable of protecting that interest without undue infringement on First Amendment rights.

Before prohibiting speech or punishing a speaker after the fact, the government must demonstrate that a compelling interest is at stake in the case at bar. With regard to Respondent Michael Smith, the state has never demonstrated how disclosure of his grand jury testimony will jeopardize the effectiveness of the grand jury which has long since adjourned. In fact, this case clearly illustrates how adoption of the state's po-



sition would make it possible for prosecutors, by subpoenaing reporters, to deprive the public of important information about government corruption.

Furthermore, Florida's claims that disclosure by grand jury witnesses generally will harm the grand jury process are so remote and speculative that they cannot serve as the basis for a statutory prohibition against disclosure by all grand jury witnesses.

Even in cases where a compelling interest can be demonstrated, the state must also prove that a restraint on expression is narrowly tailored to prevent the perceived harm. However, through its contempt provision, the Florida statute creates a presumption that anything a grand jury witness says publicly about the matter under investigation after testifying is material that was presented to the panel. This effectively reverses the presumption, enunciated repeat-

edly by this Court, that speech about public affairs is protected under the First Amendment unless the government proves that there is a compelling need to keep the specific type of information secret. Furthermore, by prohibiting disclosure by witnesses in all cases, the statute permits no case-by-case examination to determine whether a restraint will be effective and whether it is narrowly tailored.

Finally, the broad restriction on expression imposed by this statute is detrimental to the very system the state of Florida claims it is protecting. The news media have a long and distinguished history of uncovering and reporting on political corruption. If a reporter can be barred from discussing corruption charges merely because he or she has been questioned by grand jurors, a skillful prosecutor can effectively silence criticism of his performance or that of his political allies.



## ARGUMENT

### I. FLA. STAT. § 905.27 IS AN UNCONSTITUTIONAL RESTRAINT ON NEWS DISSEMINATION

The Florida statute operates as both a prior restraint on speech and subsequent punishment of those who disclose grand jury testimony. It prohibits grand jury witnesses from disclosing their own testimony (§ 905.27(1)) and the news media from disseminating the testimony of witnesses who make such disclosures (§ 905.27(2)). A person who violates these prohibitions can be convicted of a misdemeanor (§ 905.27(4)) or held in criminal contempt (§ 905.27(5)).

As this Court recognized in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976):

> prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.

Id. at 559. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." New York Times v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (citations omitted).

Justice Holmes first noted that the First Amendment protects speakers against being punished for their utterances as well as against prior restraints. Schenck v. United States, 249 U.S. 47, 51-52 (1919). Since then, this Court has repeatedly held that laws and court rulings penalizing speakers for contempt for discussing or criticizing government actions are unconstitutional.[2] On numerous occasions it

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[2] See e.g. Bridges v. California, 314 U.S. 252 (1941) (voiding publisher's contempt for criticizing judge's action in labor dispute); Pennekamp v. Florida, 328 U.S. 331 (1946) (voiding contempt for inaccurate accusation in newspaper during grand jury proceeding that judges were lenient toward certain individuals under grand jury



has concluded that states cannot constitutionally impose criminal or civil penalties for publishing information lawfully obtained by the news media from judicial records, other government documents or by employing routine reporting techniques.[3]

In Schenck, Justice Holmes asserted that sanctions may be imposed against a speaker only when "the words used . . . create a clear and present danger that they will

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[2] Continued
investigation); Craig v. Harney, 331 U.S. 367 (1947) (voiding media contempt for criticizing judge's action in civil case); Wood v. Georgia, 370 U.S. 375 (1962) (voiding county sheriff's contempt for charging publicly that grand jury was being used for political purposes and for interfering with the grand jury).

[3] See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (rape victim's name obtained from document court clerk permitted reporter to read); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (information about secret judicial inquiry board proceeding); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979) (name of juvenile homicide suspect obtained from police and prosecutor); The Florida Star v. B.J.F., 109 S.Ct. 2603 (1989) (rape victim's name obtained from document sheriff placed in press room).

bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52 (emphasis added). Looking back on the line of cases refining Justice Holmes' standard, the Court stated in Bridges v. California, 314 U.S. 252 (1941), that:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Id. at 263.

This Court has stated that prior restraints on publication of information reporters obtain legally pose an even greater threat to First Amendment interests than statutes which penalize speakers after the fact.

> A prior restraint, by contrast [to a post-publication penalty] and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for a time.



Nebraska Press, 427 U.S. at 559 (footnote omitted).

It does not matter whether application of § 905.27 to grand jury witnesses is viewed as a prior restraint or a punishment after the fact. Under the decisions cited above, it could pass constitutional muster only if Florida could demonstrate a compelling state interest in preventing witnesses from disclosing their own testimony and that, in the case at bar, disclosure would pose a "clear and present danger" to that interest. It would have to demonstrate that the statute is narrowly tailored to effectively serve that interest without imposing an unnecessary burden on protected expression. Nebraska Press, 427 U.S. at 562.

### A. The State's Asserted Interest Is Not Sufficiently Compelling To Justify An Absolute Prohibition On Witnesses' Disclosure Of Their Grand Jury Testimony

The state of Florida contends that the blanket, perpetual prohibition against witness disclosure in § 905.27 is warranted by a compelling need to protect the secrecy of grand jury proceedings. In support of this proposition, it cites the justifications provided by this Court for maintaining grand jury secrecy generally:

> (1) To prevent the escape of those whose indictment may be contemplated;
> (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
> (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it;
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to commission of crimes;
> (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.



Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3rd Cir. 1954)).

However, the mere existence of a generalized state interest, no matter how compelling, is not sufficient to deprive a person of First Amendment protection. The State must demonstrate the need for secrecy on a case-by-case basis and it has provided no explanation of how disclosure by reporter Michael Smith of his own grand jury testimony after the grand jury has adjourned would jeopardize any of the interests enumerated in Douglas Oil. It has not even claimed that this grand jury investigation or witness is unique, justifying a restraint on witness disclosure in this case.

#### 1. None Of The State's Asserted Interests Justify Gagging Smith

Addressing each alleged danger in turn, it becomes apparent that the state's fears

are not only hypothetical, but are so remote and speculative that they fail to establish a compelling need for perpetually gagging Smith.

Prohibiting Smith from publishing information about his appearance before the grand jury will not prevent those who might be indicted from escaping because in this case the grand jury investigation has been terminated and no one was indicted.[4] Further-

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[4] This Court affirmed a decision declaring unconstitutional an Indiana statute which subjected to criminal punishment any person who published the name of an individual against whom a sealed indictment or information had been filed until the defendant was in custody. Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd without opinion, 469 U.S. 1200 (1985). In its opinion, the Seventh Circuit said:

> [T]he language of the statute does not limit its applicability to those situations which do present a "clear and present danger." At best the State's fears are remote and speculative. This degree of danger is



more, while the grand jury was in session, its targets already knew that they were under investigation.

Similarly, there is no danger that Smith's proposed publications would interfere with grand jury deliberations or would prompt targets of the investigation to attempt to influence the proceedings.[5] Because the grand jury adjourned without returning any indictments, there is no reason for anyone to tamper with witnesses or dis-

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[4] Continued
insufficient to warrant an infringement on the First Amendment.

Id. 739 F.2d at 1225.

[5] The State argues that grand jurors need to remain anonymous in order to carry out their function without fear of reprisal. But it is routine in at least some parts of Florida to call the roll of grand jurors in open court when they are given their charge and to repeat this procedure when they return to open court following deliberations. This long-standing practice belies the state's argument that juror anonymity is essential to the grand jury process. Appendix at A-6 to A-9.

courage potential witnesses from testifying. While it is conceivable that a second grand jury could be convened, this rarely occurs, and surely is no justification for a blanket prohibition in this instance or with regard to grand juries generally.

The concern that disclosure will reveal the identities of the innocent accused has some facial appeal here because no indictments were returned. But it is specious because the identities of individuals under investigation had already been widely publicized. See Appendix at pg. A-5. In fact, Smith's proposed publications might actually dispel rumors and gossip about the targets of the investigation. As this Court observed in voiding a prior restraint prohibiting news stories about a criminal pretrial suppression hearing:

> It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more



> damaging than reasonably accurate news accounts.

Nebraska Press, 427 U.S. at 567.

The state argues that the prohibitions in § 905.27 are necessary because permitting witnesses to disclose their own testimony could have an inhibiting effect on witnesses in future grand jury investigations as well as on the particular grand jury in question. Petitioners Brief at 11-13. But the State reads more meaning into this Court's decision in Douglas Oil than is warranted. That case involved the request of a third party for access to a transcript of grand jury testimony for use in a civil proceeding. A request for disclosure of information not provided by the person seeking access differs markedly from Smith's desire to disclose only his own testimony.

In Douglas Oil, the Court said that potential witnesses would be reluctant to appear before a grand jury out of fear that a judge or someone privy to the investigation

would reveal their testimony later. But there is no foundation for the assertion that allowing each witness to decide for himself whether to disclose his own testimony will have an inhibiting effect on potential witnesses in future grand jury investigations.

The State has failed to demonstrate that Smith's proposed publications would "diminish the effectiveness" of either this grand jury or future grand juries. In re Russo, 53 F.R.D. 564, 572 (C.D. Cal. 1971). It follows, then, that there is no compelling need for an absolute and permanent restraint on Smith's First Amendment right to speak.

**2. There Is No Justification For A Blanket, Statutory Ban On Witness Disclosure**

Florida's blanket prohibition on disclosure is facially unconstitutional with regard to grand jury witnesses as well as being unconstitutional as applied to Smith in this case.



Beginning with Cox Broadcasting, Inc. v. Cohn, 420 U.S. 469 (1975), this Court has repeatedly overturned prior restraints and post-publication punishment aimed at journalists who, like Smith, legally obtained information about judicial proceedings and criminal cases. Justice Holmes' "clear and present danger" standard is at least implicit in every one of them. In each, this Court required the state to demonstrate how the situation confronting the court that imposed the restraint posed a serious and imminent threat to the asserted state interest.

In Landmark Communications, supra, a newspaper publisher was convicted under a Virginia statute that prohibited disclosure of information regarding proceedings before a state judicial review commission. The state constitution provided for the commission to investigate charges against judges and to operate in confidentiality. A state

statute made it a crime to disclose information related to judicial inquiries.

This Court recognized the importance of confidentiality in such proceedings, as evidenced by incorporation of the provision in the Virginia Constitution, and that secrecy facilitated the work of the commission. But it held that the need for secrecy did not justify penalizing the news media for publishing truthful information about the proceedings obtained legally, especially because such speech "lies near the core of the First Amendment." Id., 435 U.S. at 838.

In Smith v. Daily Mail, 443 U.S. 97 (1979), the Court also found a state interest in confidentiality of juvenile criminal proceedings significant, but not sufficiently compelling to justify a blanket secrecy rule. At issue in that case was a West Virginia statute that made it a crime for a newspaper to publish, without approval of the Juvenile Court, the name of any youth



charged as a juvenile offender. Relying on Landmark, the Court held that the state's interest in protecting the anonymity of juvenile offenders did not justify imposing criminal sanctions on the press for the truthful publication of the identity of a juvenile suspect in a homicide investigation obtained from a prosecutor and police.

In The Florida Star v. B.J.F., 109 S.Ct. 2603 (1989), a jury awarded civil damages to a rape victim who sued a newspaper under a Florida statute making it a crime for the media to publish the names of sexual assault victims. The newspaper obtained the name from a police report made available to reporters by the sheriff. Relying heavily on Smith v. Daily Mail, this Court voided the award, holding that the state's interest in protecting privacy was not so compelling that it would overcome the media's First Amendment right to publish lawfully ob-

tained, truthful information in all instances.[6]

It should be noted that the State of Florida argues here, as it did in Florida Star, that because the Legislature passed a statute creating a class of confidential information and designating who may have such material, anyone else cannot obtain the information legally. It goes on to state that:

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[6] Several federal courts have recognized that gags on grand jury witnesses are permissible only upon a showing of compelling need in the case at bar, rather than a generalized claim that grand juries must be secret to function properly. For example, the Eighth Circuit held that "there must be a 'compelling necessity . . . shown with particularity'." In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676, 681 (8th Cir. 1986). That ruling was cited by the Eleventh Circuit in upholding a District Court order mandating grand jury witness secrecy. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559 (11th Cir. 1989). See also In re Grand Jury Witness Subpoenas, 370 F. Supp. 1282, 1285 (S.D. Fla. 1974) ("under the circumstances of this case, disclosure would be inconsistent with valid reasons for maintaining a cloak of secrecy in grand jury proceedings"). See also In re Grand Jury Proceedings, 814 F.2d 61, 69 (1st Cir. 1987) (secrecy order not justified when government "has not made a showing of why



> because suppression of lawfully obtained information is not at stake, the state need not show that continued secrecy represents "the highest form of state interest" or a "compelling state interest."

Petitioner's Brief at 18.

But this Court has rejected the argument, stating that:

> the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them. . . . Nor does the fact that the Department apparently failed to fulfill its obligation under § 794.03 not to "cause or allow to be . . . published" the name of a sexual

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[6] Continued
secrecy would be required in these particular circumstances"); and In re Grand Jury Subpoena Duces Tecum, 575 F. Supp. 93, 94 (S.D.N.Y. 1983) (government claim that "investigation would be frustrated" does not constitute a "particularized showing of need for secrecy" sufficient to overcome First Amendment interests). In all of these cases the grand juries were still in session, a factor that was critical in the two Florida federal court cases in which secrecy orders were upheld. The Eleventh Circuit found that "[t]he court's concern for grand jury secrecy and for the grand jury's law enforcement function is generally greatest during the investigative phase of grand jury proceedings." 864 F.2d at 1564, quoting S. Beale & W. Bryson, Grand Jury Law & Practice, § 10:18 (1986).

> offense victim make the newspaper's ensuing receipt of this information unlawful.

Florida Star, 109 S.Ct. at 2610-11. It noted that the state could provide a remedy against the government employee or agency that disclosed confidential information, but not against the media.

In Landmark Communications, without passing on the constitutionality of the Virginia law prohibiting disclosure of judicial inquiry material, this Court concluded that the newspaper legally obtained the information even though its source almost certainly violated the law. Under Landmark, a reporter who obtains and publishes grand jury testimony in violation of § 905.27(2) cannot constitutionally be punished.

Adoption of Florida's position in this case would lead to the absurd result that a reporter could publish information leaked by a grand juror without fear of punishment, but could not disclose his own testimony.



Furthermore, this Court would send a clear signal that subpoenaing reporters covering a political corruption investigation could work to a prosecutor's advantage by cutting off the flow of information to the public.

As the Eleventh Circuit properly noted in ruling that § 905.27 cannot constitutionally be applied to witnesses, the failure of the federal court system to impose a blanket restraint on grand jury witnesses undermines Florida's contention that there is a sufficiently compelling need for perpetually silencing them. Indeed, the Federal Rules of Criminal Procedure have always specifically exempted witnesses from grand jury secrecy requirements. Fed. R. Crim. P. 6(e). See Federal Rules of Criminal Procedure, Preliminary Draft, Advisory Committee Notes

(1943) (secrecy rule "does not apply to witnesses before the grand jury").[7]

The State correctly points out that the federal rule does not set a limit on how states can ensure the secrecy of grand jury proceedings. Petitioners Brief at 15. But the 43-year history of Rule 6(e) demonstrates that allowing grand jury witnesses to disclose their own testimony does not impair the federal grand jury system.

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[7] On at least three occasions between February 1941 and February 1943, the Advisory Committee on Rules of Criminal Procedure discussed whether Fed. R. Crim. P. 6(e) should apply to witnesses. One member explained his opposition to a gag on witnesses as follows:

> MR. MEDALIE: . . . An employee has a right to come back and tell his boss; a fellow director has a right to come back and tell his fellow director what has happened. What has happened here is that people in close personal relations cannot tell each other what happened before the grand jury when it is to their interest and the interest of their business; everything they are doing; they should know and exchange that information.
>
> Now we have developed a notion about grand jury secrecy that is really



In addition, the experience of at least 30 states that do not impose blanket bans on disclosure by grand jury witnesses belies Florida's claim. Among these states, rules in 11 states, plus the District of Columbia and the Virgin Islands, specifically exclude witnesses from grand jury secrecy, and rules in four states have been interpreted as operating similarly to Rule 6(e). In addition, rules in at least 15 states are silent

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[7] Continued

> perfectly absurd. After all, it is only an inquiry made by a judicial body. . . . In New York, for instance, there is no prohibition in the statute on a witness telling what his testimony was before the grand jury. Nothing bad has happened, and the pretense of this secrecy simply produces a falsehood. The fact is there is not that secrecy.

Minutes of Meeting Feb. 20, 1943, at 288. See also Hearing Before the Advisory Committee on Rules of Criminal Procedure, United States Supreme Court, Feb. 21, 1941 at 75-76; Advisory Committee on Rules of Criminal Procedure, United States Supreme Court, May 18, 1942 at 222-226.

as to any secrecy requirement on grand jury witnesses. See Appendix at pg. A-10.

Florida, nonetheless, claims that regardless of what the federal courts and other states have decided, it is "within the discretion" of its Legislature to enforce "an absolute blanket of secrecy" on grand jury witnesses. Petitioners Brief at 15, 17.

Judicial deference to legislative policy decisions is appropriate in some instances. Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholds court deference to legislative purpose in enacting economic regulation); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines"). But unqualified deference to the policy-making discretion of the



Florida Legislature is impermissible where, as here, the state statute infringes a right protected by the U.S. Constitution. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Landmark Communications, 435 U.S. at 843. Chief Justice Burger stated that while the Legislature may appropriately declare its purposes in enacting a particular law:

> [T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Id. at 844.[8]

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[8] The Court quoted with approval Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 378-79 (1927):

> [A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed

Furthermore:

> The ultimate responsibility to define the limits of state power regarding freedom of speech and expression rests with this Court, [citations omitted] and when it is claimed that such liberties have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim presented.

Wood v. Georgia, 370 U.S. 375, 386 (1962) (footnote omitted).

Because the state has demonstrated neither a compelling need to silence Smith in this case nor an interest in protecting grand jury secrecy so great that a blanket

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8 Continued

> which are essential to validity under the Federal constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the Legislature.

Landmark, 435 U.S. at 843-44.



prohibition would be permissible, this Court should declare § 905.27 unconstitutional to the extent that it prohibits grand jury witnesses, including reporters, from disclosing their own testimony.

### B. Florida's Blanket Prohibition Is Not Narrowly Tailored To Protect The State's Asserted Interest

Even if this Court were to find that Florida's interest in protecting grand jury secrecy is sufficiently compelling, § 905.27 is unconstitutional. The decisions of this Court require that no restraint on speech be imposed unless it is capable of furthering that interest without unduly infringing on the First Amendment interests at stake in a particular case. Nebraska Press, 427 U.S. at 562.

The State vehemently asserts that § 905.27, while prohibiting publication of what a witness tells the grand jury, does not prevent him from reporting information

gained through his "independent efforts." Petitioner's Brief at 20. It claims, therefore, that § 905.27 serves its purpose without unduly burdening protected speech.

The State's argument that § 905.27 is narrowly tailored is disingenuous because before the grand jury witnesses can testify only as to what they know before appearing, and can identify and discuss only evidence which they have previously seen. Therefore, the statute can serve its intended purpose only if it prohibits witnesses from discussing all that they know about the subject under investigation merely because they were questioned by the grand jury.

Furthermore, the State acknowledges that the gag imposed by § 905.27 prohibits disclosure of far more than that which transpires in the grand jury room. It states that the statute prohibits "Smith from reporting facts that he did [] learn or testify to when he was before the grand jury."



Petitioner's Brief at 20, n. 8 (emphasis added). It would appear, therefore, that if a witness such as Smith is questioned closely by the grand jury there will be nothing that person can say publicly after appearing before the panel.

The statute's criminal contempt provision, § 905.27(5), makes it virtually impossible for witnesses to disclose anything related to their testimony.

As this Court stated in Near v. Minnesota, 283 U.S. 697 (1931):

> where a newspaper . . . has been suppressed because of the circulation of charges against public officials of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher to escape which he must satisfy the court as to the character of a new publication. . . .
>
> If we cut through mere details of procedure, . . . public authorities may bring the owner . . . before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and, unless the owner . . . is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper . . . is suppressed and further publication is

> made punishable as a contempt. This is of the essence of censorship.

Id. at 283 U.S. 709-710

So, too, Fla. Stat. § 905.27 creates a presumption that a person who publicly discusses matters under investigation, after appearing as a witness, has violated the law. The witness runs the risk of being hauled before a judge and bearing the expense of hiring a lawyer to prove that the comments were based on information obtained through "independent efforts."

In overturning a contempt finding against a sheriff who not only made public the nature of a grand jury investigation of him, but communicated directly and publicly with the panel, the Court stated that:

> Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed. . . . [I]n the absence of any showing of an actual interference with the undertakings of the grand jury, this record lacks persuasion in illustrating the serious degree of harm to the administration of law necessary to justify exercise of the contempt power.



Wood, 370 U.S. at 393.

A statute which prohibits grand jury witnesses from disclosing their own testimony regardless of whether such speech would interfere with the inquiry is, by definition, not narrowly tailored to protect the state's interest. As this Court recognized in Wood, supra, with regard to invocation of the contempt power, and in Florida Star with regard to imposition of civil damages following publication, 109 S.Ct. at 2612, case-by-case examination is required by the First Amendment.[9] As the decisions cited

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[9] As the Court ruled in voiding a Massachusetts statute requiring secret court proceedings in all criminal cases involving juvenile sexual assault victims, mandatory court closure statutes are, by definition, not narrowly tailored to protect a compelling state interest. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-08 (1982). Acknowledging the significant interest states have in protecting young victims, the court nonetheless said that the need for secrecy must be demonstrated on a case-by-case basis. Such analysis is no less necessary before restrictions are

in footnote 6, supra, indicate, requiring a court in each case to evaluate the state's asserted need for secrecy and the breadth of any gag order, if required, would impose only a minimal burden on the government.[10]

This case clearly illustrates the over-breadth of § 905.27. The grand jury was convened as a result of Smith's stories published in the Charlotte, Fla., Herald-News. The Florida statute makes it impossible for

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9 Continued
imposed on speech. Florida Star, 109 S.Ct. at 2612.

10 Petitioners' reliance on Seattle Times v. Rhinehart, 467 U.S. 20 (1984), to support a contrary result is misplaced. In fact, that decision endorses the proposition that case-by-case analysis is required before issuance of a prior restraint. Id. at 37 (Brennan, J., concurring). Furthermore, that case did not involve a broad, perpetual ban on speech like the one imposed by § 905.27. This Court stated that the potential for abuse of the civil discovery process by litigants is very great and that a party could inflict great harm on an opponent or third parties if no limits could be placed on disclosure of information obtained under the discovery rules. Id. at 34-35. The criminal justice system is designed to minimize the potential for such



Smith, after appearing before the grand jury, to publish information acquired in the course of his investigative reporting as well as that which he told the grand jury. If he were to publish anything about the case it is likely that he would be held in contempt and forced to suffer the expense of proving that what he published was not part of his testimony.

Prohibiting him from disclosing his testimony will not alleviate the harms that the statute was intended to prevent. For instance, despite Smith's refusal to answer reporters' questions when he emerged from the grand jury room, news accounts at the

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10 Continued
abuses, so it is not necessary to relax the standard applied in determining whether to gag grand jury witnesses. In addition, the possibility of abuse of the grand jury militates in favor of permitting, rather than restricting, disclosure by witnesses because prosecutorial misconduct and runaway grand juries are matters of grave public concern.

time clearly indicated, and the special prosecutor acknowledged, that the investigation centered on the State Attorney's office. See Appendix pg. A-5.

The only issue about which the news media speculated was whether the grand jury was investigating the possibility that a 1974 death had been a homicide that was covered up, or a case in which a county grand jury failed to indict several suspects who were later convicted in federal court of drug trafficking. See Appendix pg. A-4. Smith had previously written about the state attorney's handling of both cases.

Thus, the contents of his grand jury testimony were already public, and prohibiting disclosure of his testimony would accomplish nothing.[11] Clearly, a prior restraint on Smith would not "effectively prevent the anticipated harm." Nebraska Press, 427 U.S. at 562.

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[11] Probably the only thing Smith could have learned purely from his appearance before the grand jury is the specific questions he was asked. It is doubtful that these



## II. FLA. STAT. § 905.27 MAKES IT IMPOSSIBLE FOR THE NEWS MEDIA TO FULFILL THEIR JUDICIALLY RECOGNIZED FUNCTION OF INFORMING THE PUBLIC ABOUT POLITICAL CORRUPTION AND THE CONDUCT OF GOVERNMENT OFFICIALS

The constitutional guarantee of freedom of the press is intended to allow an informed citizenry to hold public officials accountable for their actions and, therefore, the Court of Appeals decision should be affirmed as a matter of public policy.

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[11] Continued
questions revealed anything to Smith that he did not already know, given his extensive independent investigation of the subject of the inquiry. After likening a judicial inquiry board investigation to a grand jury proceeding, the Third Circuit concluded that a witness could not be prohibited from disclosing information obtained as a result of appearing before the board as well as material obtained from outside sources. First Amendment Coalition v. Judicial Inquiry Board, 784 F.2d 467 (3rd Cir. 1986). Further, it has been held that "the secrecy which is to be upheld is the final action or inaction of the grand jury and not the specific questions propounded to and specific answers given by a particular witness." In re Grand Jury Summoned Oct. 12, 1970, 321 F. Supp. 238, 240 (N.D. Ohio 1970).

The press, in its "watchdog" role, acts as a check on government by exposing abuses and corruption to public scrutiny.[12] First Amendment scholars describe the news media as performing the "task of preventing abuses of the public trust." Blasi, "The Checking Value in First Amendment Theory," 1977 A.B Foundation Res.J. 521, 584. See generally Nimmer on Freedom of Speech, § 1.02[I] (1989).

This Court has said that the watchdog function is especially significant in connection with news coverage of the judicial system.

> The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsi-

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12 Professor Vince Blasi characterized this as "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials." Blasi, "The Checking Value in First Amendment Theory," (1977) A.B. Foundation Res.J. 521, 527.



> bility of the press to report the operations of government.

Cox Broadcasting, 420 U.S. at 492. A similar view of the news media's role was expressed in Sheppard v. Maxwell, 384 U.S. 333 (1966):

> A responsible press has always been regarded as the handmaiden of effective judicial administration. . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. at 350 (emphasis added).

Applying the Florida statute to Smith threatens to eliminate the kind of news coverage that is crucial to self-government. Long before the grand jury was convened, Smith was fulfilling his role of guarding against the miscarriage of justice by reporting on an alleged coverup by a sheriff and failure of a state attorney to prosecute a shooting death officials had termed a suicide. It was due to Smith's efforts that a grand jury was convened to investigate the

death and alleged misconduct. Now that he has been called to testify, § 905.27 prevents Smith from continuing to inform the public about the actions of government officials in this case because he fears that he will be charged with a misdemeanor or held in contempt.

The significance of news media exposure of government abuses is demonstrated by an impressive list of investigative stories that, like Smith's, led to grand jury investigations. The Pulitzer Prize competition provides a mere sampling of how reporters' efforts have exposed corruption that might otherwise have gone unchecked. Between 1970 and 1989, the Pulitzer, newspaper journalism's most prestigious honor, has been awarded 13 times for news reporting that has prompted grand jury



investigations.[13]

For example, the Indianapolis Star won the 1975 Pulitzer for Local Investigative Reporting for a six-month investigation by a team of reporters that uncovered widespread corruption in the city police department. "Pulitzer Prizes in Journalism, 1917-1985," 1975 nominating letter, Library of Congress Microfilm 86/225 (H). The newspaper's probe revealed that dozens of policemen were en-

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13 The following newspapers received Pulitzers for stories that prompted grand jury investigations: Long Island, N.Y., Newsday, 1970 Meritorious Public Service Award for stories about secret land and zoning deals involving public officials and political party officeholders; Chicago Tribune, 1971 Local Investigative Reporting Award for exposing payoffs to police officers from ambulance companies in exchange for referrals; Boston Globe, 1972 Local Investigative Reporting Award for stories revealing city officials' violations of municipal contract bidding laws; Chicago Tribune, 1973 Local Investigative Reporting Award for a series of articles uncovering voter fraud in municipal elections; Washington Star-News, 1974 National Affairs Reporting Award for stories tracing secret and illicit campaign contributions; Indianapolis Star, 1975 Local Investigative Reporting Award for exposing corruption in

gaged in graft and protection for prostitution, narcotics trafficking, bootlegging and gambling. After the series was published, a federal grand jury was convened, and many policemen were targets of the inquiry.

The 1978 Local Investigative Reporting Award went to the Stamford, Ct., Advocate for reporter Anthony Dolan's series detailing corruption in the Stamford Police Department and other municipal departments.

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13 Continued
the city police department; Philadelphia Inquirer, 1977 Local Investigative Reporting Award for stories detailing corruption and abuse of patients at a state mental hospital; Philadelphia Inquirer, 1978 Meritorious Public Service Award for uncovering evidence of illegal police violence against homicide suspects; Stamford, Ct., Advocate, 1978 Local Investigative Reporting Award for a series on corruption by police officers and other city officials; Arizona Daily Star, 1981 Local Investigative Reporting Award for reporting on misuse of funds and other misconduct by the University of Arizona head football coach; Washington Post, 1983 Local Investigative Reporting Award for stories about rape of inmates in a Maryland detention center; St. Petersburg, Fla., Times, 1985 Local Investigative Reporting Award for revealing corruption by a county



"Pulitzer Prizes in Journalism, 1917-1985," supra, 1978 nominating letter. Dolan demonstrated that the state police, the state attorney general and the FBI had refused to investigate organized crime in Stamford. His stories prompted numerous resignations and dismissals of officials. Eight separate federal inquiries and a special federal grand jury probe of city corruption followed publication.

The St. Petersburg, Fla., Times won the 1985 Local Investigative Reporting Pulitzer after two reporters revealed that the Pasco County Sheriff's office was riddled with inefficiency, cronyism and corruption while the sheriff conducted personal business out of his office. "Pulitzer Prizes in Journal-

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13 Continued
sheriff; Philadelphia Inquirer, 1985 Local Investigative Reporting Award for documenting a pattern of unprovoked attacks by police dogs on civilians. "Pulitzer Prizes in Journalism, 1917-1985," Library of Congress Microfilm 86/225 (H).

ism, 1917-1985," supra, 1985 nominating letter. Among the discoveries published in the newspaper was the sheriff's appointment of an eccentric millionaire with whom he did business to a prominent position in the department and the bungling of a key criminal investigation. The newspaper series, which at first prompted the sheriff to harass the reporters and then to fire some of his deputies, ultimately led to the sheriff's indictment on multiple felony charges.

Journalists who report on government abuses and corruption often are subpoenaed to testify before grand juries convened to investigate the exposed misconduct. Several of the Pulitzer Prize winning reporters, for example, were called to testify before grand juries. A Boston Globe reporter who won the 1972 Local Investigative Reporting Award for exposing municipal contracting violations was subpoenaed by a grand jury investigating city officials. Brine and Wermiel, "3



former Somerville mayors indicted," The Boston Globe, Aug. 11, 1971, p. 1, col. 1. Similarly, Indianapolis Star reporters who contributed to the paper's 1975 prize-winning coverage were subpoenaed by a federal grand jury convened to investigate corruption in the police department. Sup. Ct. Marion Cty., Crim. Div. 1, Dec. 7, 1973; Sup. Ct. Marion Cty., Crim. Div. 2, March 25, 1974, Sept. 2, 1974, and Oct. 4, 1974.

Numerous other journalists have been subpoenaed by grand juries investigating political corruption because of their reporting efforts. For example, Philadelphia Bulletin reporter Fawn Vrazo was subpoenaed in 1980 to testify before a New Jersey grand jury that was investigating allegations of theft of public funds. In re Grand Jury Subpoena of Vrazo, 176 N.J. Super. 455, 423 A.2d 695 (1980). A grand jury investigating political corruption in Pennsylvania subpoenaed reporters' notes of conversations with

a witness in the investigation who had discussed the case with the district attorney. In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963). A Massachusetts grand jury subpoenaed a transcript of a Boston Globe reporter's interview with the mayor concerning an alleged recipient of a bribe. In re Suffolk County Grand Jury (Sup. Ct. Suffolk Co., Mass. 1976). A Richmond, Va., Times-Dispatch reporter who wrote an article on the use of drugs by lawyers, judges and public officials was subpoenaed by a grand jury investigating the matter. In re Robin Traywick (Va. Cir. Ct., Div. 1, July 18, 1982).

The Florida statute's broad prohibition against disclosure by grand jury witnesses lends itself to abuse by prosecutors who may have reason to silence particular reporters. For example, a skillful prosecutor embroiled in a scandal, or whose political associates have been accused of corruption,



could compel the reporter covering the case to testify before a grand jury and ask questions about all matters related in past news stories. Under § 905.27, the journalist could then be ordered not to disclose anything related to the grand jury testimony, effectively silencing critical news coverage.

Reporters could be in the untenable position of having to comply with grand jury subpoenas because of their investigative reporting, and then having to abandon their reporting efforts or run the risk that they will be jailed or fined for having violated § 905.27.

As Justice Stewart noted in his dissent in Branzburg v. Hayes, 408 U.S. 665 (1972):

> [U]nder the guise of "investigating crime" vindictive prosecutors can, using the broad powers of the grand jury which are, in effect, immune from judicial supervision, explore the newsman's sources at will, with no serious law enforcement purpose. The secrecy of the grand jury proceedings affords little consolation to a news source. . . .

Id. at 745, n. 34 (Stewart, J., dissenting). He further acknowledged that "a confidential relationship between a reporter and his source [could] be so sensitive that mere appearance before the grand jury by the newsman would substantially impair his newsgathering function." Id. at 751.

Yet, under § 905.27, a reporter called before the grand jury could be fined or jailed for telling the public that he refused to answer any questions put to him by jurors.

If reporters can be silenced simply by being called to testify before a grand jury, coverage of government officials would be severely curtailed. Particularly when news coverage of corruption and official misconduct is limited, the public is harmed because it is denied information that is crucial to voting decisions.



## CONCLUSION

For the reasons stated above, Amici urge this Court to declare Fla. Stat. § 905.27 unconstitutional insofar as it prohibits disclosure by witnesses of their grand jury testimony and dissemination of such disclosures by the news media.

Respectfully submitted,

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December 18, 1989

# APPENDIX

## APPENDIX

## TABLE OF CONTENTS

Charlotte (FL) Herald-News
June 26, 1985 P. A-1



# Hunting 'suicide' apparently was killing with intentional cover-up

By MIKE SMITH
Staff Writer

**An 18-year-old serviceman's shooting death while hunting with Lee County Sheriff Frank Wanicka more than ten years ago was deliberately covered up and made to look like a suicide, according to evidence uncovered during an investigation by the Daily Herald-News and an independent investigation conducted by two Fort Myers men.**

**Evidence obtained in the case, much of it from the sheriff's department's own case file, indicates substantially that the death was not a suicide, but was a killing which was made to look like a suicide.**

**Other evidence indicates Sheriff Frank Wanicka and some of his deputies may have participated in the cover-up, which survived the scrutiny of a Florida Department of Criminal Law Enforcement investigation and a grand jury inquiry which was handled by Ninth Judicial Circuit State Attorney Robert Eagan.**

The case involved the death of William Bradley Jackman Jr., 18, an Alva youth who was home on leave for the Christmas holidays after completing his basic training in the Air Force.

Jackman was killed December 30, 1974, near Wanicka's hunting camp at Babcock ranch.

According to the Lee County Sheriff's Department's case report, Jackman's body was found "just inside" Lee County at the Charlotte County border.

Jackman was found dead, laying on his back, with a .30-30 caliber lever action rifle between his legs and a large bullet hole located nearly in the center of his chest.

A suicide "altar" containing two messages, one carved into the back of a cardboard sign with a pocket knife, the other scratched into the sugar sand, were located near Jackman's body. Two small wallet-sized photographs, identified in police reports as Jackman's sister and girlfriend, were also found stuck into the sand beside the messages.

The death scene looked like a classic suicide. There were even spent rifle cartridges on the ground which one medical examiner called "test shots" which were apparently fired prior to the alleged suicide.

The cause of death was listed as a self-inflicted gunshot wound to the chest which virtually exploded Jackman's heart, according to the autopsy report by Dr. Wallace M. Graves Jr. Graves is the Medical Examiner for Lee County and performed an autopsy on Jackman the day after his death.

Immediately following the death, rumors began circulating that Jackman had not committed suicide but had in fact been killed by someone else, who made the death scene appear as a suicide. Rumors also circulated that the killing took place in Charlotte County and that the body had been moved to Lee County.

In 1975, the rumors prompted the Governor of Florida to order an investigation into the death by the Florida Department of Criminal Law Enforcement, the forerunner of the state investigative agency now known as FDLE.

Dr. Joseph H. Davis, a nationally known forensic pathologist who is currently the Medical Examiner for Dade County, was also employed in the Governor's investigation. Davis reviewed the evidence submitted to him by the Governor's investigators and concluded that the death was indeed a suicide. In April 1976, a Lee County grand jury also looked into the matter. The grand jury was headed by State Attorney Robert Eagan, who was appointed by the Governor as a special prosecutor in the case.

The grand jury issued a report that the panel found "no credible evidence that (the death) was anything but a tragic suicide." The grand jury further stated that "it appears to the grand jury that rumors, hearsay and gossip as to the cause of death of the young man are maliciously fostered and spread by persons whose motives are something other than the dissemination of truth."

**Due to an investigation into the incident by the Daily Herald-News and two Fort Myers men, Brian Bevan and Julian Harper, evidence was collected which indicates the death was not a suicide at all and that the suicide scene itself was manufactured after the young military man's death.**

Unknown to each other and working independently on separate investigations into the Jackman case, the Daily Herald-News became aware of the Bevan-Harper investigation and contacted the two men.

In comparing the findings of their independent investigations, the trio found the case nearly solved except for several minor details, including that of locating the type of weapon which could have made the massive entrance wound in Jackman's sternum — a wound which was not consistent with either a contact gunshot wound or the entrance wound of a .30-30 caliber rifle, which was shown lying between Jackman's legs in the police photographs of the death scene.

The photographs were crucial in solving the case, but without Bevan's Welsh persistance, would not have been made available. While investigating the case, Bevan attempted to obtain the photographs from the Lee County Sheriff's Department but officials there would not release the photographs even though Florida's Public Records Law mandates that the records be available for public inspection.

The sheriff's department even attempted to exempt the photographs from the public records law but released copies of several of the death scene photographs after Bevan notified the department of his intention to file a suit in order to obtain them.

Even so, the sheriff's department did not release all of the photographs to Bevan and he intends to file the civil action today for the intention of pursuing the case.

When the photographs were compared to the written police reports, numerous discrepancies appeared which led to discrediting nearly all of the evidence appearing in the

# Hunting 'suicide' appears to be a killing

death scene.

Some of the discrepancies Bevan found were incredible, such as one on the blood-spattered suicide note. Bevan found that a blood spatter appeared on the note in a place covered by a pocket knife in the death scene photographs — a spatter which tends to discredit the suicide note as a fraud.

The rifle was also determined not to have been the instrument of Jackman's death when it was determined that, in order for Jackman to shoot himself, the muzzle would have had to contact his chest.

Several forensic pathologists were contacted, including Dr. Graves, the medical examiner who performed the autopsy; and, after examining the photographs of the wound, the forensic pathologists indicated that it was not consistent with a contact gunshot wound.

"It's (the wound) sharply demarcated," Graves said. "There do not appear to be any lacerations of the wound margins which are sometimes seen in (contact) entrance wounds over hard, fixed bony tissue due to the expansion of gases from the muzzle of the gun escaping under the skin." Graves added however, that the sternum of a person Jackman's age would be flexible.

The wound itself, too large for a .30-caliber bullet, at the sternum measured 1.8 cm in diameter, according to Graves' autopsy report.

Searching through firearms ammunition catalogs and finding no rifle cartridges which match the entrance hole, shotgun shells were cut apart and measured until it was determined that a twelve-gauge rifled slug measured exactly 1.8 cm in diameter.

"Having been shown a twelve-gauge rifled slug, which measures approximately 1.7 to 1.8 cm, I would say that the gunshot wound is consistent with such a projectile," Graves said. "I might add the caveat that I am not a ballistics expert but I am familiar with gunshot wounds."

Other factors in the photographs also indicated foul play after the fact or the manipulation of the body after death. One such factor was what appeared to be a bloody hand print on Jackman's upper left arm and similar but less well-defined blood smears or prints in the same area on his right arm, suggesting the body had been carried by the arms. The photographs were taken during the on-scene investigation before the body was removed to the morgue, according to Sheriff Wanicka's witness statement in the police report. "It is not inconsistent with a hand print. But I can not be sure due to the quality of the photograph," when the blood smear on the left bicep was pointed out while examining the photographs during the interview.

Blood movement and pooling on the left side of the body indicated that, at the time of death, the left arm was in a position different from the outstretched, over-the-head position depicted in the photographs. Large tell-tale blood spots on the shirt sleeve corresponded to those on Jackman's left side.

"This clearly indicates to me, in my opinion, that the left arm was at his side when all this bleeding took place," Graves said, adding that he was not implying that the body was altered or had been dragged to another location. "The blood pattern on the shirt and on his arms is suggestive of his arms having been raised above his head after death. Looking at the scene photographs it is apparent to me that the arms were raised above the head after death but I am not implying that that was done in order to alter the death scene."

The heavy blood flow on the left side was consistent with the theory that the boy had been partially rolled to that side in order for someone to get into Jackman's right rear pants pocket to obtain his wallet and the photographs which were used in setting up the so-called suicide "altar," according to another forensic pathologist.

Although property receipts are in the case file for the rifle, empty cartridges, the two photographs, pocketknife, and a wristwatch, there is no wallet among the items listed in the property receipts. The wallet sized suicide "altar" photograph which the police reports say is supposed to have been Jackman's sister is also wrong. The girl in the photograph, while similar in appearance to Jackman's sister, was identified as an entirely different individual after researching high school yearbooks.

Discrepancies and an apparent attempt to mislead are also to be found in the sworn witness statement made by Wanicka. One such statement appears to imply that the medical examiner went to the scene to examine the body.

The statement reads: "We waited for (Col.) Dave Wilson (Wanicka's second in command) and when he came back, we had him contact the Coroner to see what he wanted to do with the body. We explained the situation to him. When he came back, we all went to the scene and the Coroner said to go ahead to move the body that it was apparent that there was no foul play involved."

Graves said that when Wilson informed him of the death he was told that the body was in a relatively inaccessable area and it was a long hike from where a vehicle could park to where you would have to go to retrieve the body."

The death scene Wilson referred to is apparently different from that which Wanicka refers to, in his sworn witness statement, which reads "...I drove back thence to a road that goes East to West on the County Line and right at the County Line or just inside the County Line I discovered the boy's body laying on the ground."

Wanicka, the last to see Jackman alive when he dropped the boy off, was also the first to find the body. According to his witness statements he appears to be the prime suspect in the killing. In one instance Wanicka said "I was carrying a shotgun at this time and the other three passengers in his vehicle were carrying rifles."

Wanicka described the area where Jackman's body was found: "Looking at the scene, when I first came up, there were no other footprints...except Brad's (Jackman)."

Concluding the statement, Wanicka said, "At this time we feel that there is no doubt in our minds that this was a suicide we can find no reason that there would be any chance of foul play or accidental shooting. The scene itself is impossible for anyone to walk in that area and drag the boy there without leaving some tell-tale sign."

Graves said that when Wilson informed him of Jackman's death" obvious suicide was the term he used.

"If I had known that the sheriff, or any other high ranking public officials were involved, I would have gone to the scene," Graves said. "I was not informed it was the Sheriff's hunting camp, nor was I informed that the Sheriff was there."

Tomorrow: more discrepancies which further substantiate that William Bradley Jackman's death was not a suicide.

Charlotte (FL) Herald-News
December 7, 1985



# State attorney withdraws legal counsel during reporter's grand jury testimony

## D'Alessandro asks governor to appoint another state attorney

By JEFF EVANS
Staff Writer

Stressing the need to avoid "any possible appearance of impropriety," State Attorney Joe D'Alessandro on Friday evening withdrew as legal counsel for certain matters now being presented to a Charlotte County grand jury.

According to D'Alessandro, the portion from which he stepped down referred "solely as to matters presented Dec. 3," the day in which only testimony by Daily Herald-News reporter Mike Smith was presented to the grand jury.

In a short press conference following the release of his one-page statement, D'Alessandro refused to divulge the nature of the testimony that led to his withdrawal, citing the "veil of secrecy" in which grand jury matters are cloaked by law.

The state attorney did repeat remarks he had made to members of the press earlier this week, claiming that he "has not been so advised" of any grand jury allegations of wrongdoing on the part of himself or his staff.

Smith, the author of a series of articles critical of D'Alessandro's office, has also refused to discuss his testimony.

"...in order to preserve the integrity of and to insure continued confidence in the grand jury system, so as to avoid any possible appearance of impropriety, I have withdrawn as legal advisor to the grand jury solely as to matters currently being presented to it," said D'Alessandro, reading from his statement.

The state attorney said he would continue to advise the grand jury on all unrelated matters.

After Smith, who was present for most of the press conference, left the room, D'Alessandro blasted the reporter's stories, saying they were "not very kind in their description of my office.

"Those stories have touched probably on everything and every place in Charlotte County," D'Alessandro said. "I haven't read a single thing in any of those stories that is positive toward the county."

When asked if he felt Smith had a vendetta against his office, D'Alessandro said, "I'd rather not comment on that."

D'Alessandro said he has contacted the Governor's office and requested that another state attorney be appointed for these matters. According to D'Alessandro, no further testimony regarding that heard Dec. 3 can be taken until a replacement is appointed.

D'Alessandro chuckled when asked whether he would be recommending a substitute to Graham.

"Contrary to what you people believe, I don't have any input in these decision," he said. "The Governor has a procedure to follow, and he follows it."

Graham appointed embattled Osceola County State Attorney Robert Eagan when D'Alessandro stepped down from the investigation of suspended Charlotte County Sheriff Glen E. Sapp. Eagan himself is presently under grand jury investigation for alleged wrongdoings in office.

D'Alessandro met with Circuit Court Judge William McIver for 25 minutes and then met with the grand jury for more than an hour before making his announcement.

Sarasota Herald-Tribune
December 11, 1985 P. A-1



# Graham Appoints Adviser for Charlotte Jury

## *State Attorney From Jacksonville Is Tapped*

By DAN FAGIN
Staff Writer

Ed Austin, longtime Jacksonville state attorney, was chosen Friday by Gov. Bob Graham to advise a Charlotte County grand jury because "we needed somebody in there who is above criticism," one Graham aide said.

State Attorney Joe D'Alessandro withdrew his office as the grand jury's adviser Dec. 6 after the panel heard testimony from a local reporter who has repeatedly alleged abuse in the office of D'Alessandro, the 20th Judicial Circuit's chief prosecutor.

Graham approved an executive order appointing Austin, the 4th Judicial Circuit state attorney, as the grand jury's adviser for "all matters pertaining to or arising from the testimony of Mike Smith," said Barbara Linthicum, deputy general counsel.

Smith, who has written articles in the Punta Gorda Daily-Herald News criticizing prosecutors in the 20th Judicial Circuit and members of Lee County Sheriff Frank Wanicka's department, testified before the grand jury Dec. 3 for 90 minutes.

The content of Smith's testimony is secret, but Linthicum said, "I understand he's going to come back before the grand jury."

Austin said Friday that he and Assistant State Attorney Dennis Guidi, "one of my top assistants," probably will meet with the grand jury "one day next week" in Charlotte County. He said he had not yet decided whether he would conduct future sessions of the grand jury in person, or assign an assistant to the job.

Asked if he was aware of the subject of the panel's probe, Austin replied: "only as much as you can get from a five-minute phone call" (from Linthicum).

"I've been told: 'These are the allegations, and these are the counter-allegations,'" Austin said. "That's my assignment - to get to the bottom line."

Among the allegations in Smith's articles: D'Alessandro and his office withheld information from previous grand juries in several crimi-

*Continued on 16A*

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nal case, agreed to lenient charges against drug smugglers who later were indicted by federal grand juries, and covered up information concerning the shooting death of an Alva man who was hunting with Wanika.

The executive order appoints Austin as the grand jury's adviser for six months, but Linthicum said Austin has the option of asking the state supreme court to extend the appointment, or asking the governo to broaden the mandate outlined in the executive order.

The Charlotte County grand jury's six-month term is set to expire Jan. 20, but the panel may vote to extend its term for up to 90 days in order to complete an investigation.

Linthicum cited three reasons in her decision to recommend Austin to the governor.

First, she said, "You need somebody who has experience. Mr. Austin's been through this so many times. He knows how to handle the grand jury."

Austin has been the state attorney for the sprawling Jacksonville metropolitan area - Duval, Clay and Nassau counties - since 1969, except for a two-year hiatus. He has served as legal adviser to two statewide grand juries.

"It was important to get someone who'd go down there with a fresh point of view," Linnicum said.

"He's somebody who hasn't been involved," she said. "He's on the other side of the state."

Finally, she said, Austin's stature as someone who was "above criticism," was an important factor. Austin is "very well thought of," she said."

"There's been a lot of criticism leveled at Mr. (Robert) Eagan," she said. Eagan, the 4th Judicial Circuit state attorney was Graham's choice to serve as legal adviser to the Charlotte County grand jury that indicted suspended sheriff Glen Sapp in May.

D'Alessandro had withdrawn his office from the probe as well, since a sheriff within the 20th Judicial Circuit was a target of the investigation. Sapp later was convicted of a grand theft indictment issue by the grand jury, but the trial judge's order granting Sapp a new trial is being appealed.

Fort Myers (FL) News-Press
January 11, 1986 P. A-1



# Grand jury probes state attorney office matters

By CHUCK TOBIN
Charlotte Bureau Chief

PUNTA GORDA — A Charlotte County grand jury is probing matters relating to 20th Judicial Circuit State Attorney Joseph D'Alessandro's office, the jury's new adviser said after a meeting with grand jurors Friday.

Ninth Judicial Circuit State Attorney Ed Austin met with grand jurors Friday, the jury's first meeting since Gov. Bob Graham appointed Austin on Dec. 13 to replace D'Alessandro, who withdrew as the jury's adviser on the current investigation.

The grand jury met twice last month before Austin was appointed adviser.

After Friday's meeting, Austin said jurors are probing "allegations touching on Mr. D'Alessandro's office," the first time an official has hinted at the subject of the jury investigation. But Austin added that such an investigation "is not unhealthy."

"There's not a state attorney in the state who hasn't had this happen," Austin said. "To have grand juries challenge those in a position of authority — there's nothing wrong with that. We're often accused of manipulating grand juries."

D'Alessandro withdrew from the proceedings on Dec. 6, saying he wanted "to avoid any possible appearance of impropriety." He said Friday that he has "total confidence in the grand jury system" and is not worried about the current probe.

"I understand the system. I don't have any problem with what they're doing," D'Alessandro said. "Whatever the accusation is, I'd just like to get the air cleared on it."

D'Alessandro said Austin is an "excellent prosecutor and an excellent state attorney." He said he has not had contact with Austin "other than the fact that I knew he was coming down."

Grand jurors met at the Charlotte County Courthouse for 2 hours and 40 minutes Friday and interviewed Punta Gorda Daily Herald-News reporter Mike Smith, who testified before the jury on Dec. 3.

Smith, who has written articles alleging corruption and cover-up in D'Alessandro's office, testified for 1 hour and 40 minutes Friday. A court reporter entered and left the jury's meeting room about the same time as Smith, indicating that Smith's testimony was recorded.

Smith testified for 90 minutes at the jury's Dec. 3 meeting after he "requested of the

See JURY, back page this section

grand jury that he appear before that body," according to D'Alessandro's letter of withdrawal to Graham. Smith was invited and not subpoenaed to testify, D'Alessandro has said.

After testifying Friday, Smith said, "I would assume that they may call me back, and I will go back if they do." He said Friday's meeting was "more productive than it was the last time."

Austin, accompanied by his assistant state attorneys Dennis Guidi and Steonen Kunz, said he met with Smith for breakfast Friday before the grand jury convened at 10 a.m.

The grand jurors' terms are scheduled to expire Jan. 20, but Austin said he will file a motion next week to extend the jurors' terms 90 days. The jury's activities will be "restricted to what they have under consideration at this time."

Austin said he expects jurors to meet again "sometime within the next 30 or 40 days, but we have to do some investigative work first." Guidi and Kunz will conduct the investigation, Austin said.

Austin said he will not use the state attorney's office as his Charlotte County base, but will set up "independent quarters."

Smith has written stories alleging that D'Alessandro's office has withheld information from grand jurors during investigations.

Smith also has written stories accusing D'Alessandro's office of participating in a coverup with Lee County Sheriff Frank Wanicka into the 1974 shooting death of an Alva man who had been on a hunting trip with Wanicka's family. A medical examiner ruled the death a suicide, but Smith has said evidence exists proving that the man did not die by his own hand.

The current grand jury's probe has been cloaked in greater secrecy than most others. Meetings usually are confirmed in advance, but officials have declined to comment on any matters relating to the current grand jury.

# State Attorney

THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA
5TH FLOOR COUNTY COURTHOUSE ANNEX
TAMPA, FLORIDA 33602

BILL JAMES
STATE ATTORNEY

AREA CODE 813
272 5400


October 3, 1989

WELCOME TO THE HILLSBOROUGH COUNTY GRAND JURY

You have just assumed a most important responsibility in the administration of justice. The Office of the State Attorney offers you its full cooperation and assistance as you undertake this significant position.

Many hours of labor have gone into the preparation of this manual which outlines and explains some of the laws and procedures with which you will be concerned. I would urge that you give this material your closest attention. You must be cognizant of certain basic matters to perform your duties in a responsible and effective manner. Although it takes many years to become a knowledgeable lawyer in criminal law and procedure, and we recognize you cannot become an expert in a short period, your familiarity with the following information will be of great assistance.

I hope you will find this a rewarding and enriching experience. Thank you for undertaking this important function in the enforcement of our laws and the administration of justice.

Sincerely,

Bill James

BILL JAMES

## ORDER OF PROCEEDINGS

1. CALL ROLL.

2. ASK QUALIFICATION QUESTIONS AND EXPLAIN SERVICE.

3. EXCUSES.

4. SWEAR THE BAILIFFS.

5. SELECT GRAND JURY.

6. SWEAR GRAND JURORS.

7. APPOINT FOREMAN AND VICE-FOREMAN.

8. INSTRUCT THE GRAND JURY.

## WHEN GRAND JURY HAS SOMETHING TO REPORT:

1. ASSEMBLE IN OPEN COURT AND CALL ROLL.

2. ASK IF THEY HAVE ANYTHING TO REPORT.

3. LET THE CLERK PUBLISH ANY INDICTMENTS.

4. ASK GRAND JURY IF THEY HAVE SET A NEW MEETING DATE.

can perform any function as a grand jury, at least fifteen of your number must be present. At least fifteen being present, it requires the affirmative vote of twelve to find a true bill. Any less number than twelve voting in the affirmative results in no true bill and the discharge of the defendant. Twelve or more voting in the affirmative results in a true bill. You report that matter to the State Attorney or his assistant, he prepares a true bill for you, and your foreman endorses his name on the back of it, and the grand jury presents that true bill into open court and it then becomes an indictment upon which a trial can be had. If no true bill, your foreman endorses on the back of the paper "no true bill" and signs it as foreman; the grand jury presents that into open court and the defendant is then discharged and his bondsman released.

At your sessions no person shall be present except the witness under examination, the State Attorney and/or his assistants, the court reporter or stenographer, and the interpreter, if any. The stenographic records, notes, or any transcript thereof made by the court reporter or stenographer shall be filed with the Clerk of the Court and kept by him

in a sealed container not subject to inspection by the public. The law provides that such notes, records, and transcription shall be opened and released by the clerk upon the request of any grand jury for the use of such grand jury.

The State Attorney is your legal advisor, appointed by law for the purpose of presenting to you such matters as may come before you for your consideration. He has the right to be present in your grand jury room and you have the right to have him present in your grand jury room to aid you in the examination of witnesses and at all times, except when you deliberate or vote whether or not to find a true bill. At that time there must be no one present in the grand jury room except members of the grand jury.

Your foreman, your acting foreman, the State Attorney or the Assistant State Attorney shall administer an oath or affirmation, in the manner prescribed by law, to any witness who shall testify before you. Your clerk keeps a list of all witnesses sworn before you and at the termination of your labors returns that list into open court where it then becomes a part of the records of this Court.

## STATE GRAND JURY SECRECY RULES AND STATUTES

**The following statutes and rules follow Fed. R. Crim. P. 6(e):**

Alaska Crim. R. 6(h), (l); D.C. Court R. Ann. 6(e); Hawaii R. of Penal P. 6(e); Ill. Rev. Stat. ch. 38, § 112-6; Kan. Stat. Ann. § 22-3012; Mass. R. Crim. P. 5(d); Mont. Code Ann. § 46-11-317; R.I. R. Crim. P. 6(e); Vt. R. Crim. P. 6(f); V.I. Code Ann. tit. 5, § 6(e); Va. Code R. 3A:5(b); W.Va. R. Crim. P. 6(e)(2); Wyo. Stat. §§ 7-5-307, -308.

**The following statutes and rules are interpreted as operating similarly to Fed. R. Crim. P. 6(e):**

Minn. R. Crim. P. 18.08; Del. Code Ann. tit. 11 § 1273; S.D. Cod. L. Ann. 23A-5-16; N.Y. Penal L. § 215.70.

**The following statutes and rules are silent as to secrecy requirements on grand jury witnesses:**

Ark. Stat. Ann. § 16-85-514; Cal. Penal Code § 924.2; Ga. Code Ann. § 15-12-68; Idaho Crim. R. 6(e); Iowa Code § 813.2, R. 3; Me. Rev. Stat. Ann. tit. 15, § 1252; Md. Crim. R. 8-213; Neb. Rev. Stat. §§ 29-1404 to -1415; N.H. Rev. Stat. Ann. § 600:3, 4; Ohio R. Crim. P. 6(e); Okla. Stat. tit. 21, §§ 582, 583; Or. Rev. Stat. § 132.060, 100; Penn. R. Crim. P. 256-257; Tenn. R. Crim. P. 6(k)(1); Wis. Stat. § 756.20.